UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 725

Cases No. 791: KOSMINA
No. 792: MIKHAYLIN
No. 793: PAVLOV
No. 801: SLAVASHEVICH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 17 April 1994, Vyacheslav Kosmina, Alexandre Mikhaylin and Rosaline Alexandre Pavlov, and on 15 July 1994, Alexandre Slavashevich, all former staff members of the United Nations, filed applications requesting the Tribunal, inter alia:

"...

(a) To rescind the decision of the Secretary-General not to extend the Applicant[s]' contract[s] beyond 31 January 1992;

(b) To order the Applicants' immediate reinstatement with payment of full salary and applicable allowances and benefits from the date of [their] separation from service to the date of reinstatement;

(c) To find and rule that the Joint Advisory Committee erred as a matter of law in failing to find that the Applicant[s] [were] entitled to immediate reinstatement and reimbursement of lost earnings for the period since [their] separation;

(d) To find and rule that the decision of the Respondent not to extend the Applicant[s]' fixed term appointment[s] was flawed by the intrusion of prejudice and other extraneous factors and marred by irregularities in procedure;

(e) To award the Applicant[s] additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant[s] as a result of the Respondent's actions or lack thereof;

(f) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case[s].

(g) To award the Applicant[s], as costs, the sum of $5,000.00."

Whereas the Respondent filed his answer on 11 May 1994;

Whereas the Applicants filed written observations on 30 November 1994;

Whereas the facts in the case are as follows:

The Applicant Kosmina entered the service of the United Nations on 5 October 1989, on a two year fixed-term appointment, as an Associate Translator at the P-2, step I level. His Letter of Appointment stated, as a special condition, that he was "on secondment from the Government of the USSR". His appointment was extended, first for one month and 27 days, through 4 November 1991, then for two further one month periods, through 1 January 1992, when he separated from the service of the United Nations. The extensions contained no special condition.

The Applicant Mikhaylin entered the service of the United Nations on 8 October 1989, on a two year fixed-term appointment, as a Translator at the P-3, step III level. His Letter of Appointment stated, as a special condition, that he was "on secondment from the

Government of the USSR". His appointment was extended, first for one month through 7 November 1991, then for one month and 24 days through 31 December 1991 and finally, for a further month, through 31 January 1992, when he separated from the service of the United Nations. The extensions contained no special condition.

The Applicant Pavlov entered the service of the United Nations on 3 October 1988, on a two year fixed-term appointment, as an Associate Translator at the P-2, step II level. His Letter of Appointment stated, as a special condition, that he was "on secondment from the Government of the USSR". His appointment was extended, first for three months and 29 days, through 31 January 1991, and then for a further two months, through 31 March 1991. These extensions were on secondment from the USSR. The Applicant's appointment was subsequently extended for six months and 2 days, through 2 October 1991; one month, through 2 November 1991; one month and 29 days, through 31 December 1991 and then, for a further one month, through 31 January 1992, when he separated from the service of the United Nations. These extensions contained no special condition.

The Applicant Slavashevich entered the service of the United Nations on 3 October 1988, on a two year fixed-term appointment, as an Associate Translator, at the P-2, step IV level. His Letter of Appointment stated, as a special condition, that he was "on secondment from the Government of the BSSR [Byelorussian Soviet Socialist Republic]". His appointment, on secondment from BSSR, was extended for one year, through 2 October 1991. It was then extended for one month and 29 days, through 30 November 1991, and thereafter for a further month, through 1 January 1992, when he separated from the service of the United Nations. These extensions, after 2 October 1991, contained no special condition.

On 31 May and 4 June 1991, respectively, the Applicants Kosmina and Mikhaylin signed their first performance evaluation reports (PERs). Both Applicants were given an overall rating of "fair". They instituted rebuttals to their PERs, the Applicant Kosmina by an undated memorandum and the Applicant Mikhaylin by a memorandum dated 2 July 1991. On 30 May and 3 June 1991, respectively, the Applicants Pavlov and Slavashevich signed their second PERs. Both Applicants were given an overall rating of "a good performance". Both instituted rebuttals to their PERs, the Applicant Pavlov by a memorandum dated 5 July 1991, and the Applicant Slavashevich by a memorandum dated 1 July 1991.

In a letter dated 2 August 1991, all the Applicants requested the Secretary-General to renew their fixed-term appointments, due to expire in October, or to award them career appointments. In a memorandum dated 16 August 1991, to the Assistant Secretary-General for Human Resources Management, the Under-Secretary-General in charge of the Department of Conference Services (DCS) recommended the non-renewal of the Applicants' appointments. In a memorandum dated 21 August 1991, the Applicants requested the Executive Officer, DCS, to extend their contracts at least for the time necessary to complete consideration of the rebuttal procedures they had instituted.

On 9 September 1991, the Applicants wrote to the Coordinator of the Panel on Discrimination and Other Grievances (the Panel on Discrimination). They requested the Panel to consider the consistent pattern of discrimination against those staff members of the Russian Translation Service who were no longer "on secondment" from the USSR Government. In a memorandum dated 20 September 1991, the Interim Coordinator of the Panel on Discrimination requested the Assistant Secretary-General for Human Resources Management to extend the Applicants' appointments for two months, on the ground that their preliminary investigation had discovered evidence of a pattern of discrimination in the Russian Translation Service. In a reply

dated 24 September 1991, the Assistant Secretary-General for Human Resources Management informed the Interim Coordinator of the Panel on Discrimination that he had decided to extend the Applicants' appointments for one month, to allow for completion of their rebuttal procedures.

The Rebuttal Panel, after reviewing the Applicant Kosmina's rebuttal, submitted its report on 17 September 1991. It proposed no changes in the Applicant's PER. Upon a request from the Applicant, together with a statement signed by 19 staff members, indicating that higher standards of performance evaluation had been applied retroactively, the Rebuttal Panel reconsidered the case. It did not accept the Applicant's claim, but did recommend upgrading his evaluation in certain categories. No recommendation was made, however, to change the overall rating of "fair".

The Rebuttal Panel, after reviewing the Applicant Mikhaylin's rebuttal, submitted its report on 15 October 1991. It stated that new and higher standards had been used to evaluate the Applicant's performance. It recommended upgrading his evaluation in certain categories. No recommendation was made, however, to change the overall rating of "fair".

The Rebuttal Panel, after reviewing the Applicant Pavlov's rebuttal, submitted its report on 19 September 1991. It recommended the upgrading of the Applicant's evaluation in one category and the deletion of another category which it deemed was not relevant to his work. No recommendation was made, however, to change the overall rating of "good".

The Rebuttal Panel, after reviewing the Applicant Slavashevich's rebuttal, submitted its report on 15 October 1991. It recommended the upgrading of the Applicant's evaluation in a

number of categories and the upgrading of his overall performance rating to "very good".

In four memoranda, all dated 15 October 1991, the Under-Secretary-General in charge of DCS considered the reports of the Rebuttal Panels. He decided to upgrade the ratings in two individual categories for the Applicants Kosmina, Mikhaylin and Slavashevich, and in one individual category for the Applicant Pavlov. He did not change the overall performance rating of any of the Applicants.

In a memorandum dated 18 November 1991, the Chief of the Russian Translation Service advised the Executive Office of DCS of his recommendations regarding the Applicants, noting the results of their rebuttals In each case, he stated that the Applicant's performance could not be certified as fully satisfactory and recommended no extension of his appointment. The Executive Officer of DCS transmitted these recommendations to the Assistant Secretary-General for Human Resources Management, who requested the Under-Secretary-General of DCS, on 19 December 1991, to review the cases. In a reply dated 31 December 1991, the Officer-in-Charge, DCS, endorsed the recommendations not to renew the Applicants' appointments. On 31 January 1991, the Applicants separated from service.

On 2 March 1992, the Applicants Mikhaylin, Pavlov and Slavashevich requested the Secretary-General to review the decision not to renew their appointments. On 5 March, 24 April and 26 April 1992, respectively, they lodged appeals with the Joint Appeals Board (JAB).

On 19 October 1992, the Panel on Discrimination reported its findings to the Assistant Secretary-General for Human Resources Management, that the Applicants were subject to "prejudicial treatment on the part of the Administration", "unequal treatment", "harassment", and "discrimination". It recommended that the

Applicants be reinstated and that appropriate measures be taken "to prevent similar situations from occurring in the future."

On 26 October 1992, the Applicant Kosmina requested the Secretary-General to review the decision not to renew his appointment. On 17 November 1992, the Director of Personnel advised the Applicant Kosmina that his request for review was time-barred. On 15 December 1992, the Applicant Kosmina lodged an appeal with the JAB.

On 16 December 1993, the JAB adopted its report, indicating that it had waived the time-limits in the Applicant Kosmina's case and had considered the cases of the four Applicants jointly. The JAB's conclusions and recommendation read as follows:

> "85. The Panel concluded that the responsibility of the Organization was engaged because the Respondent had taken the contested decisions (i) without due care, (ii) following a joint DCS-OHRM review which was procedurally flawed, and (iii) without a previous impartial investigation of a not implausible allegation that prejudice had tainted the contested decisions. However, the Panel was unable to conclude with certainty what would have been the outcome if these defects had not been present. Therefore, following the example of the Tribunal in the **Vitkovski** case, the Panel, instead of recommending reinstatement of the Applicants, **recommends** that each of them be paid, for the injury sustained, an amount equal to eighteen months of their net base salary at the rate in effect at the date of separation."

On 17 April 1994, the Applicants Kosmina, Mikhaylin and Pavlov, and on 15 July 1994, the Applicant Slavashevich filed with the Tribunal the applications referred to earlier.

On 19 April 1994, the Acting Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to each of the Applicants and advised them that "[a]lthough not in agreement with all of the Board's findings and conclusions, the Secretary-General, in the interest of a satisfactory resolution of the cases dealing with staff formerly thought to be on secondment, has agreed with the recommendation of the Board that you be paid an

amount equal to eighteen months of your net base salary at the rate in effect at the date of your separation from the Organization."

Whereas the Applicants' principal contentions are:

1. Even though accepted in its entirety by the Secretary-General, the recommendation of the JAB for the amount to be paid in lieu of reinstatement falls short as a remedy for the harm done.

2. In the light of precedent set by the Tribunal and the findings of the Panel on Discrimination, the "continued intransigence of the Respondent" requires both reinstatement and compensating damage as reparation.

Whereas the Respondent's principal contentions are:

1. In Judgement No. 559, the Tribunal decided that payment of 18 months net base salary was appropriate compensation for claimants in the same position as the present Applicants.

2. The award of the same amount by the Secretary-General to the present Applicants is a reasonable exercise of his discretion which adequately compensates the present Applicants.

The Tribunal, having deliberated from 24 October to 21 November 1995, now pronounces the following judgement:

I. The appeals in these cases are from decisions of the Respondent, dated 19 April 1994, accepting the recommendation of the Joint Appeals Board (JAB), dated 16 December 1993, that the Applicants be paid 18 months' salary. The JAB, finding that the four cases involved common questions, joined them for consideration in a single report. The Tribunal also considers that joinder of these cases is appropriate and will decide them in a single

Judgement. In addition, oral argument is requested. The Tribunal decides that the files are adequate and that oral argument is unnecessary.

II. The Tribunal notes that a claim was made by the Respondent, before the JAB, that the Applicant Kosmina's appeal was not receivable because of the untimeliness of his request for review of the administrative decision to separate him from service. The decision had been communicated to him in writing on 2 January 1992, but he did not request its review until 26 October 1992. He was awaiting action by the Panel on Discrimination and Other Grievances (the Panel on Discrimination) on his complaint. The JAB held that it was authorized by staff rule 111.2(f)(sic.) to waive the time limit. Presumably, the intended reference was to staff rule 111.2(e). Although the Respondent contested the timeliness issue before the JAB, he has not done so before the Tribunal, which, therefore, need not consider it.

III. The JAB report in these cases reflects a careful and thorough analysis of the facts. The JAB noted that its recommendation, which was accepted by the Respondent, was patterned on the remedy found by the Tribunal to be appropriate in Judgement No. 559, Vitkovski and Rylkov (1992). The JAB had concluded that the cases of the four individuals under consideration involved circumstances sufficiently similar to those in Judgement No. 559 to warrant a similar remedy. The present appeals are aimed at convincing the Tribunal that differences in the present cases justify a more extensive remedy than that recommended by the JAB and accepted by the Respondent.

IV. Specifically, the Applicants ask that the Tribunal rescind the Respondent's decision not to extend the Applicants' contracts; to order their reinstatement with payment of full salary and allowances and benefits; to award additional compensation for

alleged actual, consequential, and moral damages; to fix the amount of the compensation in lieu of specific performance at three years' net base pay; and to award each of the Applicants as costs $5,000.

V. The Applicants, like those in Judgement No. 559, had been staff members serving in the Russian Translation Service. Their employment by the Organization began prior to Judgement No. 482, Qiu, et al. (1990), and at that time, they were deemed to be on secondment from their governments. The Applicants Slavashevich and Pavlov began their service in 1988, on two-year fixed-term appointments which were subsequently extended for one year. The Applicants Mikhaylin and Kosmina were first appointed in 1989 for two years. All of the appointments expired in October 1991. They were extended in installments to 31 January 1992, pending completion of an internal review process presumably intended by the Administration to make impartial and objective recommendations with respect to extensions of employment by persons in the position of the Applicants. The principal issue in the present cases, as viewed by the JAB, was whether the internal review process provided the Applicants with the elements of due process and fair procedure so as to assure them of reasonable objective consideration; or if the process and the resulting adverse recommendations were flawed by extraneous considerations or other improper factors. This is the issue that was considered by the Tribunal to be central in Judgement No. 559. The JAB found that, in the process of considering whether to extend the fixed-term appointments of the Applicants, the Respondent failed to exercise the prudence, care, and attention deemed appropriate by the Tribunal in Judgement No. 559.

VI. The JAB also found that the procedure employed by the Administration, which led to the decisions against renewal, constituted unequal treatment since it differed from the procedure used in the cases which led to Judgement No. 559 and did not comply

with the standards set forth in Judgement No. 559. In addition, the JAB deemed that, as the Tribunal had found in Judgement No. 559, an impartial investigation of allegations of prejudice should have been, but was not conducted. The JAB's various findings were based on its analysis of the evidence. In the end, the panel made no finding on whether the Chief of the Russian Translation Service was or was not prejudiced in his actions with regard to the Applicants. The JAB also indicated, as had the Tribunal in Judgement No. 559, that it was unable to conclude with certainty what the outcome would have been if the various defects which it had identified had not been present.

VII. The Applicants, though largely in agreement with the JAB's reasoning, nevertheless say that it did not give sufficient weight to the evidence of prejudice and failed to recommend that the harm allegedly done called for a remedy beyond that in Judgement No. 559. The issues, according to the Applicants, are: whether they are entitled to reinstatement in the light of the JAB findings; whether they are entitled to additional damages; and whether they are entitled to three years salary in lieu of specific performance. The Tribunal concludes that the answer to each claim of further entitlement is in the negative.

VIII. The Applicants argue that significant features so differentiate their cases from those dealt with in Judgement No. 559 as to warrant a more extensive remedy. The Tribunal does not agree. In its view, the present cases, while not presenting facts identical in all respects to those involved in Judgement No. 559, are similar in nature. The JAB's conclusion that there was sufficient evidence to have warranted an investigation of the allegations of prejudice was appropriate. Equally, it was appropriate for the JAB, on the facts before it, to decline to make a determination on whether there was prejudice. The Tribunal is not convinced by the Applicants'

contentions, or by the evidence, that prejudice caused the non-extension of their appointments. The Tribunal also finds that the JAB dealt reasonably with the claims of extraneous influence and defective procedures. The same is true with regard to the JAB's unwillingness to accept at face value the report of the Panel on Discrimination. The Tribunal's assessment of the Applicants' contentions, measured against the report of the JAB, convinces it that there is insufficient justification for the more extreme remedies sought by the Applicants.

IX. Much is made by the Applicants of alleged unfulfilled obligations on the part of the Respondent with respect to the handling of these cases stemming from the analysis made by the Tribunal in Judgement No. 559. But that Judgement was rendered on 30 June 1992 and was not communicated to the parties until 10 August 1992. The events in the present cases occurred, for the most part, in 1991. The separation of the Applicants took place on 31 January 1992. Since this was long before Judgement No. 559, knowledge of its contents can hardly be imputed to the Respondent.

X. The Tribunal sees no decisive differences between the non-renewals of the Applicants' contracts and the comparable decisions in Judgement No. 559, which would warrant their reinstatement. As in the case of the applicants involved in Judgement No. 559, the question of entitlement to further employment by the Organization was dependent on an evaluation of the quality of the applicants' performance. It is by no means clear from their performance histories, including the pertinent Rebuttal Panel reports, that they would have received further appointments even if none of the deficiencies identified by the JAB was present. The Tribunal will not attempt to evaluate on its own their performance. Moreover, the Tribunal does not consider that administrative determinations made in Geneva with respect to the Translation Service there, on the

basis of its needs and the availability of personnel, are relevant for the Translation Service in New York.

XI. Nor does the Tribunal agree with the Applicants in respect of the weight they attribute to certain factors in influencing Judgement No. 559. The Tribunal also does not accept the Applicants' contention that the views of the Panel on Discrimination, which were disputed by the Administration, are conclusive.

XII. The Tribunal does not consider that the mere fact that similar issues had been raised previously made "more egregious" the decision of the Respondent rejecting the recommendations of the Panel on Discrimination. The Administration was, in the circumstances, entitled to make an independent evaluation of the report. That it did so and reached a different conclusion does not, in itself, warrant condemnation. The Tribunal agrees with the JAB regarding the deficiency in the report of the Panel on Discrimination, as well as with its comments regarding the Administration's investigation. While agreeing with the JAB's finding regarding the absence of an investigation of allegations of prejudice, the Tribunal does not consider that this aspect of the case justifies a drastically different remedy than that provided in Judgement No. 559. The Tribunal does not know and will not speculate as to what the outcome of an appropriate investigation of the allegations of prejudice might have disclosed.

XIII. In one respect, the Tribunal agrees with a contention advanced by the Applicants. A finding that two cases are identical may not necessarily warrant identical remedies and a finding that standards established by the Tribunal in one case were violated in another does not signify that a remedy appropriate in the earlier case is necessarily called for in the later case. It does not

automatically follow from this, however, that the remedies sought here by the Applicants must be granted. In the view of the Tribunal, it is entirely proper for it to give weight to JAB recommendations based on a careful, thorough, and well-reasoned analysis of the evidence when those recommendations are accepted by the Respondent. This does not mean, however, that the Tribunal will not independently make its own assessment of the issues presented to it in an appeal by the Applicant from such a decision by the Respondent. In these cases, the Tribunal has made its own assessment regarding the various issues raised and has concluded, for the reasons set forth above, that the Respondent's decision accepting the recommendation of the JAB was reasonable and proper and that the relief sought by the Applicants is not warranted.

XIV. For the foregoing reasons, the applications are rejected, as are the requests for costs.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary